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No. 15,954

United States Court of Appeals

For the Ninth Circuit

EDWARD LEWIS SHORT,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

Upon Appeal from the District Court for the District of Alaska, First Division.

BRIEF OF APPELLEE.

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JURISDICTIONAL STATEMENT.

Appellant was tried by a jury in the District Court for the District of Alaska, First Judicial Division at Ketchikan on a charge of bribery, in violation of §65-7-4 ACLA 1949. He was convicted upon a verdict of guilty and was sentenced to five years' imprisonment, four and a half of which were suspended, with the defendant being placed on probation for that period. Appellant filed a notice of appeal from the judgment and sentence imposed by the court.

Jurisdiction below was based on 48 U.S.C. §101, and in this court is based on 28 U.S.C. §1291.

STATEMENT OF CASE.

The defendant was tried on an indictment charging him with bribery in violation of §65-7-4 ACLA 1949.

The principal witness for the government was Walter O. Smith, an officer of the Ketchikan Police Department who was well acquainted with one Edward Clifford Bolton, a bartender at the Totem Bar in Ketchikan (R. 64).

Smith testified that during March, 1957 Bolton advised him that he was going to go on a vacation and while he was gone, would look up some "girl friends" who might be willing to come to Alaska for the purpose of prostitution (R. 79). On March 18 Bolton returned to Alaska and advised Smith that he had arranged for a girl to come to Ketchikan. He requested that Smith contact the Chief of Police for him to see if a "set-up" could be arranged (R. 79).

Smith reported the incident to the Chief of Police who immediately reported the matter to the Assistant United States Attorney in Ketchikan (R. 80).

Smith was directed to continue to investigate the matter (R. 65, 78). The Alaska Territorial Police, the Federal Bureau of Investigation, the U. S. Marshal, and the City Manager were advised and consulted about the case (R. 65-67).

Smith made daily reports of his activities (R. 67).

In the course of the investigation, Bolton advised Smith that the defendant, Edward Short, a co-owner of the Pioneer Bar in Ketchikan wanted to talk to Smith about opening a gambling game in his bar

(R. 67). Smith did nothing about the invitation and one to two weeks passed (R. 37, 68). Bolton asked him again if he had seen Short.

Finally the subject of the original investigation was sufficiently completed to justify the filing of criminal charges. At that time, since Smith's reports had shown Short's interest in talking with Smith, the Assistant U. S. Attorney instructed Smith to contact Short and "see if a bribe or a proposition of any kind was open" (R. 69).

Smith contacted Short at the Pioneer Bar at approximately 2:30 on May 7, 1957 (R. 70). He conversed idly with Short for about 45 minutes, and when nothing happened, he decided to leave. As he started to leave, Short said "Don't run off Smitty. I want to talk to you a minute" (R. 70).

Short then said, "I understand that the town is going to open up. I would like to open a two and four game in the back" (R. 71). He then asked Smith how much it would cost, and when Smith said he didn't know, Short suggested ten or fifteen per cent (R. 72).

Smith said he would check with the Chief of Police (R. 72). The Chief of Police suggested, obviously as a means of immediately securing physical evidence of the bribe, that Smith tell Short that it would be one hundred dollars a week or ten per cent, whichever is more, but one hundred dollars in advance (R. 73).

The terms of the "counter offer" were written on a piece of paper and delivered by Smith to Short

(R. 73). Shortly thereafter, in the wash room of the Pioneer Bar, Short delivered five twenty dollar bills to Smith (R. 74). The money was produced at trial as Plaintiff's Exhibit No. 1. Smith reported immediately thereafter to the United States Attorney's Office (R. 75).

Short's defense consisted—in addition to character witnesses who testified to his good reputation despite Short's conviction involving gambling and unlawful sale of liquor—of his own statement claiming that the conversations with Smith were attended by his partner, Ivan Jones (R. 193), and that he had refused to deal with Smith (R. 195). Jones corroborated this, saying that on Smith's first visit he observed the conversation between Smith and Short at the end of the bar, saw Smith conducted to the door entering on the card room, but not into the room, and then back to the bar. He stated that he then walked to the end of the bar and joined Short and Smith "very shortly" (R. 246) or within the time it takes to walk down to the end of the bar (R. 253). He claims that he heard Smith "proposition" Short, and heard Short reject the proposition.

Lucas tends to support this statement.

On rebuttal, the government produced Eugene O'Brien of the Territorial Police who testified that he was in the bar during Smith's first visit—didn't see Jones at all (R. 291), saw Short and Smith enter the card room and disappear from sight for as much as 20 minutes (R. 289) and return to the bar and was joined by no one (R. 291) although he remained in

the bar and continued to watch for as long as 10 to 15 minutes (R. 291), thus tending to discredit the testimony of Jones and Lucas.

SUMMARY OF ARGUMENT.

I. A. Denial of the motion to dismiss the indictment for failure to endorse on it the names of the grand jury witnesses did not constitute reversible error. This court has previously stated that the Alaska statute requiring such endorsement has been abrogated by the federal rules of criminal procedure. Furthermore, appellant has completely failed to sustain his burden of showing that the failure to endorse the names of the grand jury witnesses on the indictment substantially prejudiced him.

I. B. The trial judge correctly denied appellant's motion to dismiss the indictment based upon his appearance before the grand jury. Evidence adduced at the hearing on this motion establishes that he appeared before the grand jury on his own initiative, that he had consulted his attorney about doing so, and that he knew of his rights. He suffered no prejudice as a result of his testimony.

II. A. The trial judge properly allowed the government to introduce additional portions of officer Walter O. Smith's reports under the doctrine of testimonial completeness, after parts of those reports had been used in cross-examination.

II. B. Evidence of particular wrongful acts of officer Walter O. Smith and T. H. Miller was inad-

missible for the purpose of showing a pattern of conduct or for the purpose of impeachment.

III. Instructions Nos. 17 and 18 were correct and proper statements of the law relating to this case.

I. A. DENIAL OF THE MOTION TO DISMISS THE INDICTMENT FOR FAILURE TO ENDORSE THE NAMES OF THE WITNESSES APPEARING BEFORE THE GRAND JURY DID NOT CONSTITUTE REVERSIBLE ERROR.

As the appellant concedes at p. 12 of his brief this point has been decided contrary to his argument in the case of *Soper v. United States,* (9 Cir. 1955) 220 F2d 158. The court stated:

> ". . . the names of witnesses are not required to be endorsed on any indictment in the District Court for the Territory of Alaska. Such indictments need only conform to the requirements of Rule 7(c) of the Federal Rules of Criminal Procedure, 18 U.S.C.A. The indictment in this case did so conform. It should be noted and remembered that the Federal Rules of Criminal Procedure are now, and have been since October 20, 1949, applicable to all criminal proceedings in the District Court for the Territory of Alaska. See Rule 54 (a) (1) of said rules, as amended by the Supreme Court's order of December 28, 1948, 335 U.S. 953, 954, effective October 20, 1949. Sections 66-8-52 and 66-11-1, Alaska Compiled Laws Annotated, 1949, cited by appellants, became inoperative on October 20, 1949, and remain inoperative" 220 F2d at p. 159, postnote 2.

In view of this precedent the trial court correctly ruled that endorsement of the Grand Jury witnesses on the indictment was unnecessary.

Rule 7(c) provides in part:

> "The indictment or the information shall be a plain, concise and definite written statement of the essential facts constituting the offense charged. It shall be signed by the attorney for the government. *It need not contain* a formal commencement, a formal conclusion, or *any other matter not necessary to such statement . . .*" (Emphasis supplied).

The provision that it shall be signed by the attorney for the government demonstrates that it is not merely a "rule of pleading" as appellant contends. Furthermore, the statement of the court in the *Soper* case was not that Section 66-8-52 ACLA 1949 conflicts only with Rule 7(c), as appellant's argument assumes. Also to be considered is the requirement of Rule 6(e) that

> ". . . (A) juror, attorney, interpreter, or stenographer may disclose matters occurring before the Grand Jury *only* when so directed by the Court preliminarily to or in connection with a judicial proceeding or when permitted by the court at the request of the defendant upon a showing that grounds may exist for a motion to dismiss the indictment because of matters occurring before the Grand Jury" (Emphasis supplied).

Likewise Rule 16, relating to discovery and inspection is another possible area of conflict with the Alaska procedure.

However, an exhaustive discussion of this matter is unnecessary in view of the inescapable conflict between the mandatory nature of §66-11-1 ACLA 1949 and the provision of Rule 52(a) that

> "Any error, defect, irregularity or variance which does not affect substantial rights shall be disregarded."

Since no prejudice to appellant is alleged and none appears in the record, the error, if any, must be disregarded. See *Zamloch v. United States* (9 Cir. 1952) 193 F2d 889; *Steele v. United States* (5 Cir. 1957) 243 F2d 712, 715.

While we strongly contend that the failure to endorse the names of the grand jury witnesses on the indictment does not constitute reversible error, nevertheless if the court considers it necessary to overrule the *Soper* case, we urge the adoption of the technique of over-ruling prospectively as the court did in *Sunburst Oil and Refining Co. v. Great Northern Ry. Co.,* 7 P.2d 927 (Mont. 1932), affirmed 287 U.S. 538 (1932); *People v. Mangles,* 86 P. 187 (Cal. 1906); *People v. Ryan,* 92 P. 853 (Cal. 1907); and *Odom v. State,* 94 So. 233 (Miss. 1922). Because of the reliance placed on the *Soper* case by the courts and prosecutors in Alaska and the absence of any substantial harm to appellant, we submit that fairness requires this solution if *Soper* is to be over-ruled.

I. B. THE TRIAL JUDGE CORRECTLY DENIED APPELLANT'S MOTION TO DISMISS THE INDICTMENT BASED UPON HIS APPEARANCE BEFORE THE GRAND JURY.

A proper understanding of Appellant's Point I. B. requires reference to the supplement to the record, "Reporter's Transcript of Hearing on Defendant's Second Motion to Dismiss the Indictment."

The appellant was indicted by the grand jury on October 28, 1957 for the crime of bribery. Up to this time the appellant had made no appearance before the grand jury (R. 314, 328).

Because of word received by certain members of the grand jury it was deemed desirable to hear complaints against the local police department by certain persons (R. 315, 322, 327). The proceeding was not a prosecutive matter and was not done on the advice of the United States Attorney (R. 315-316, 322). Subpoenas were not issued for this purpose and the parties thought to have grievances were merely invited to appear before the grand jury and express their views. Among the persons invited was the appellant (R. 315, 322).

Prior to accepting the invitation, appellant consulted with his attorney in Anchorage (R. 318, 326, 329) and apparently with local counsel as well (R. 326).

He then appeared before the grand jury fully prepared with exhibits to support his arguments (R. 324, 325). After a few preliminary questions he launched into a lengthy criticism of the Ketchikan Police Department (R. 316-317, 324). In the course of this testimony he voluntarily and without any questions

from the United States Attorney or the members of the grand jury entered into a discussion of the subject matter of his indictment (R. 317, 324).

When the United States Attorney questioned him further on these matters, he declined to answer and demanded as a condition to his further testimony that the United States Attorney be excluded from the room (R. 317, 325). Thereafter, and with the United States Attorney excluded from the room, the appellant resumed his criticism of the local police (R. 325). Neither the motion to dismiss nor the appellant's brief, nor anything advanced in behalf of the appellant has asserted that this episode in any way contributed to the indictment or conviction of the defendant.

In short, the appellant's argument is that a grand jury, bent on achieving justice by investigating police officials, in the abstract, and against the wishes of the United States Attorney, may, by affording an already indicted defendant an opportunity to be heard in a separate and distinct matter, so violate the defendant's rights that a dismissal of the indictment is required even though the defendant appeared on advice of counsel, did in fact assert his right to refuse to testify, and did not in any way prejudice his case. To state the proposition is to establish its invalidity. It is thoroughly understandable that the appellant has been unable to find a parallel case.

There have been numerous cases, however, concerning the testimony of defendants before grand juries, and several issues appear to be well-established.

First, there is apparently no duty to advise the ordinary witness before the grand jury of his privileges under the 5th Amendment.

> "The privilege against self-incrimination is neither accorded to the passive resistant nor the person who is ignorant of his rights, nor to one indifferent thereto. It is a fighting clause. Its benefits can be retained only by sustained combat. It cannot be claimed by attorney or solicitor. It is valid only when insisted upon by a belligerent claimant in person"—*United States v. Johnson,* (D.C. M.D. Pa. 1947) 76 F. Supp. 538 at 540.
>
> *People v. Bermel,* 128 NYS 524 p. 525 (Defendant's Brief, p. 31).

There are cases holding that an indictment obtained *after* the defendant has testified under subpoena before the grand jury without first being advised of his rights is subject to dismissal.

> "The Fifth Amendment to the Constitution provides that no person shall be compelled to be a witness against himself and a proceeding before a grand jury for the purpose of determining whether or not a crime has been committed is a criminal case within the meaning of the constitutional provision (*Counselman v. Hitchcock,* 142 US 547, 35 L. ed. 1110, 12 S.Ct. 195). The defendant cannot be subpoenaed by nor sworn before the grand jury even though he fails to claim his constitutional privilege against self-incrimination unless he waives, with a full understanding of the nature of his act, his constitutional privilege against self-incrimination (*U.S. v. Edgerton,* 80 F 374). Failure to claim the privilege is not a waiver. The defendant must be apprised of his

> right (*U.S. v. Westmore,* 218 F 227). His testimony otherwise constitutes illegal evidence, invalidates the indictment, and is sufficient ground upon which to set the indictment aside."—Housel, Defending and Prosecuting Federal Criminal Cases (2nd Ed. 1946), §215, at page 285.

There are also cases holding that even in such a case the indictment is not subject to dismissal unless the defendant actually asserted his privilege and was nevertheless compelled to testify. *U. S. v. Mangiaracina* (D.C. W.D. Mo., 1950) 92 F. Supp. 96. Apparently the indictment is not subject to dismissal where the defendant actually understood the extent of his rights. *Connelly v. United States,* 249 F2d 576, 581.

A compelling argument against appellant's position is stated in *United States v. Smyth* (D.C. M.D. Calif., 1952) 104 F. Supp. 283 where Judge Fee said

> "If the rule were as stated, a United States Attorney could grant immunity to a criminal simply by calling him as a witness. For many years, the overwhelming weight of authority has held that the privilege against self-incrimination is a personal one and must be claimed and stood upon in order to be effective . . ." 104 F. Supp. at 307.

Therefore, it can be seen that there can be little merit in the appellant's assertions in this case, where the purpose of the inquiry was collateral to the criminal proceeding against the defendant, where the testimony was given after the indictment was returned, and when the defendant had the benefit of advice of counsel before testifying and actually knew of his

right to refuse to testify to matters that might be of an incriminatory nature.

In this connection, the United States Supreme Court held in *Powers v. United States* (1912) 223 U.S. p. 303 that failure to warn a defendant of the fact that the testimony could be used against him did not invalidate evidence of his testimony at a preliminary hearing.

It is submitted that the reason for dismissal of an indictment obtained after the defendant has testified about incriminating matters where such a rule prevails is that the indictment is obtained, at least in part, on unlawfully obtained evidence, and should not be allowed to stand. However, if incriminatory testimony is obtained after indictment without adequately informing the defendant of his rights, his rights would certainly be protected by exclusion of evidence so obtained. Since no such evidence was introduced or sought to be introduced in this case, the matter would be academic.

II. A. THE TRIAL JUDGE PROPERLY ALLOWED THE GOVERNMENT TO INTRODUCE ADDITIONAL PORTIONS OF OFFICER WALTER O. SMITH'S REPORTS UNDER THE DOCTRINE OF TESTIMONIAL COMPLETENESS, AFTER PARTS OF THOSE REPORTS HAD BEEN USED IN CROSS-EXAMINATION.

Appellant's Point II. A. actually raises two separate and distinct issues.

First, Appellant has requested that the officers' reports of Walter O. Smith be examined to determine

the correctness of the ruling of the trial judge in deleting certain portions of the reports before delivering them to appellant's attorney pursuant to 18 U.S.C. §3500.

An examination of the matters deleted discloses that these matters had nothing to do with the bribery charged in the indictment. Most of these matters pertained to items of hearsay concerning other persons alleged to be involved in vice conditions but against whom no charges were pending for lack of evidence.

Second, Appellant asserts that it was error for the District Court to permit the United States Attorney to read to the jury the complete reports of officer W. O. Smith after cross-examination by the appellant's attorney utilizing fragments of these reports. Title 18 U.S.C. §3500, the so-called "Jencks Law" merely defines a procedure whereby the defendant in a criminal case can obtain material to use in cross-examining witnesses for the government. Nothing in the law suggests that the rules of evidence pertaining to the use of materials so obtained are in any way changed.

In a pre-Jencks law case, *Affronti v. United States* (8 Cir. 1944) 145 F2d 3, the defendant in a narcotics case requested a copy of the Narcotic Inspector's official report for the purpose of cross-examination. The defendant then sought to discredit the testimony of the inspector by showing that his official report was in conflict with his present testimony. On re-direct examination, counsel for the government read into evidence portions of the report showing that the inspector had reported to his superiors that pur-

chases of morphine had been made from the defendant by an informer who had died prior to trial. As such, some of the statements read into evidence were inadmissible as substantive evidence—and were probably of a very damaging character. Nevertheless the court said, at page 7 of 145 F2d:

> "... The portions of the report, however, which were admitted on redirect-examination were not received as substantive evidence, but to show that the official report and the inspector's testimony were not in as serious conflict as might have been inferred from the cross-examination. We think the evidence complained of by the defendant was admissible on the important issue of the credibility of the inspector."

This is an application of the rule of testimonial completeness as outlined in the reference to *Wigmore on Evidence* in Appellant's brief (pp. 36-37). See also *United States v. Weinberg* (2 Cir., 1941) 121 F2d 826.

That this rule is valid in Alaska is demonstrated by the case of *Bennett v. United States* (9 Cir. 1956) 16 Alaska 325, 234 F2d 675 which case is unquestionably distinguishable from the present case, but where the court nevertheless said (page 678)

> "... Afterwards, the defendant's attorney took the written statement, 'O', and asked Miss Casey about other portions of it not theretofore inquired about by the prosecutor. At this point, the court was then entitled to put the whole statement before the jury, on the prosecutor's request."

In *Jones v. United States* (9 Cir. 1908) 162 F. 417 (428-432); cert. den. 212 U.S. 576, a criminal prosecu-

tion for conspiracy to defraud the United States, the court said in connection with an assertion of error arising out of admission of an entire sworn statement by the prosecutor after fragmentary use of the statement on cross-examination:

> (page 432) ". . . The declared purpose of counsel for the defendants being to show by isolated statements read by them from a previous sworn statement of the witness that he had therein made statements contradictory of his testimony on the trial, and thereby to affect his credibility, we are of the opinion that the court rightly admitted in evidence the entire statement that the jury might correctly weigh the evidence of the witness."

In the present case, counsel for appellant cross-examined the witness W. O. Smith extensively about his dealings with the witness Bolton. While there might be considerable doubt about the relevancy of these prior transactions, the appellant is hardly in a position to assert such irrelevancy in view of the emphasis he placed on these transactions during the cross-examination of Officer Smith (R. 116-126).

In fact, the reports were used almost exclusively by counsel for appellant to cross-examine Smith on his transactions with Bolton prior to the events charged in the indictment. The impression apparently desired was that Smith had been involved in an elaborate and perhaps unlawful association with criminals involving repeated efforts to obtain a "pay-off" in any of several varying sums (R. 121-124). The fragmentary quotations from the investigation report of Officer Smith tended to support the impression. Only by

reading the entire report was it possible to place the fragmentary items in their proper context. Actually, only the portions of the report admitted by the District Court were those pertaining to days actually discussed in the cross-examination (R. 151).

Finally, it is to be noted that in the transcript at page 166 it is made clear by counsel for appellant in examining Smith that nothing in the reports was substantive evidence against Short.

For the reasons outlined, it is submitted that there is no merit in the appellant's Point II. A.

II. B. THE COURT PROPERLY EXCLUDED THE TESTIMONY OF HAROLD E. SMITH AND LIMITED THE CROSS-EXAMINATION OF T. H. MILLER.

The testimony sought to be elicited from Harold E. Smith was to the effect that at the Totem Room of the Stedman Hotel, Officer Walter Smith had made a suggestion concerning opening the town, and that on another occasion, Officer Smith had approached him on the subject of using the 400 Club as a "bootleg joint" (R. 277-284). Disregarding for the moment the requirement that evidence showing prior similar conduct must indicate a definite pattern before it may be admitted to prove the doing of a particular act, it is clear that the only theory which such evidence would support in this case is that Officer Smith had entrapped the appellant. But appellant denied that he had ever offered or given any money to Officer Smith. In a similar case, *Brown v. United States,*

(9 Cir. 1958) 261 F2d 848, 850, the appellant, although denying that he had made the sale of narcotics for which he was convicted, asserted that the government had suppressed certain evidence which would show that if he had made the sale, he had been entrapped. Judge Denman stated for the court:

> "Appellant took the position at trial that he was at home on the night of the alleged sale and that he had not sold narcotics since 1953. He could not thereafter have properly raised the defense of entrapment even had Jackson's testimony provided some basis for the defense. As we said in *Eastman v. United States,* 212 F2d 320, 322, (Cir. 9):
>
> > '(2) Assignment of error No. 2 deals with the refusal of the Court to instruct on entrapment. Appellants, to say the least, take a very inconsistent position in this respect. Appellants have maintained throughout that they did not commit a crime. It logically follows that absent the commission of a crime there can be no entrapment. *Bakotich v. United States,* 9 Cir. 1925, 4 F2d 386. The trial court understood this situation and very properly refused to inject into the case a question which could have no other result than to confuse'."

The same objection applies to the cross-examination of T. H. Miller, whereby the appellant attempted to show that Miller had previously been involved in a scheme to entrap one Linn Kirkland (R. 177-181). In each instance the proposed testimony had no bearing on any fact in issue and could very possibly have misled the jury.

Furthermore, as previously mentioned, when the doing of a particular act is sought to be shown by evidence of prior similar acts, the court must first find that the evidence of prior conduct is sufficient to establish a pattern or common plan. On this subject, Dean Wigmore states:

> "304. *Theory of evidencing Design or System.* When the very doing of the act charged is still to be proved, one of the evidential facts receivable is the person's Design or plan to do it. This in turn may be evidenced by conduct of sundry sorts as well as by direct assertions of the design. But where the conduct offered consists merely in the doing of other similar acts, it is obvious that something more is required than that mere similiarity, which suffices for evidencing Intent. The object here is not merely to negative an innocent intent at the time of the act charged, but to prove a preexisting design, system, plan, or scheme, directed forwards to the doing of that act. In the former case (of Intent) the attempt is merely to negative the innocent state of mind at the time of the act charged; in the present case the effort is to establish a definite prior design or system which included the doing of the act charged as a part of its consummation. In the former case, the result is to give a complexion to a conceded act, and ends with that; in the present case, the result is to show (by probability) a precedent design which in its turn is to evidence (by probability) the doing of the act designed.
>
> The added element, then, must be, not merely a similarity in the results, but *such a concurrence of common features that the various acts are*

> *naturally to be explained as caused by a general plan of which they are the individual manifestations.* Thus, where the act of passing counterfeit money is conceded, and the intent alone is in issue, the fact of two previous utterings in the same month might well tend to negative innocent intent; but where the very act of uttering is disputed—as, where the defendant claims that his identity has been mistaken—, and the object is to show that he had a general system or plan of working off a quantity of counterfeit money and did carry it out in this instance, the fact of two previous utterings may be in itself of trifling and inadequate significance." (Emphasis in original.)

It is not entirely clear upon what basis the appellant now relies in urging the relevance of this evidence, but it is apparent that at the trial he offered it as impeachment and to show pattern. During the argument concerning the testimony of Harold E. Smith, Mr. Kay said:

> "In other words it is both impeachment and affirmative to show Smith's approach, a matter which we feel is highly relevant. If he approached this man in that manner at the Totem Bar, isn't it logical for us to claim he approached Bolton and Short in the same way." (R. 279.)

In arguing the propriety of cross-examining T. H. Miller concerning Linn Kirkland, Mr. Kay said:

> "And my reason for asking those questions, and I anticipate Mr. Miller, never having denied any of this, he would not deny it here, is I believe it would tend to show a pattern of design on the part of the Chief of Police here now, Mr. Miller.

> It would show a possible motive or a possible explanation of what happened to Mr. Short here, he having been on friendly terms with the former Chief of Police, Mr. Potter, whom Mr. Miller replaced, and, therefore, critical (160) of the firing of Mr. Potter and the hiring of Mr. Miller. That is all I have to say." (R. 178.)

Certainly the isolated acts involved here are inadequate to show a pattern of conduct. The court properly refused to admit them for that purpose.

It should also be pointed out that in Alaska the impeachment of a witness by the opposing party is governed by the provisions of §58-4-61 ACLA 1949, which reads:

> "Impeachment by adverse party: Evidence permissible. A witness may be impeached by the party against whom he was called, by a contradictory evidence, or by evidence that his general reputation for truth is bad, or that his moral character is such as to render him unworthy of belief, but not by evidence of particular wrongful acts; except that it may be shown by the examination of the witness or the record of the judgment that he has been convicted of a crime."

The evidence relating to particular wrongful acts of Officer Walter Smith and T. H. Miller is clearly inadmissible for the purpose of impeachment under the provisions of this statute.

III. THE COURT'S INSTRUCTIONS NOS. 17 AND 18 ARE CORRECT STATEMENTS OF LAW AND WERE PROPERLY GIVEN IN THIS CASE.

Instruction No. 18, relating to admissions or incriminatory statements alleged to have been made by a defendant, was based upon the statutory requirement that the jury ". . . be instructed by the court on all proper occasions: . . . Fourth. That the testimony of an accomplice ought to be viewed with distrust and of the oral admissions of a party with caution." §58-5-1 ACLA 1949. The record clearly shows the justification for the instruction. For example, these statements appear in Edward Clifford Bolton's testimony:

> Q. And what did he say?
>
> A. He just nodded and said that he may be interested in opening up a "two and four."
>
> Q. A "two and four?"
>
> A. Yes (R. 35) . . .
>
> Q. And then what else happened on that occasion?
>
> A. He just told me to send the man around. (R. 36) . . .
>
> Q. Then Mr. Short replied, and isn't this correct, "Well, if you want to send them over, or send him over, or send them over, I will talk with them. I might be interested in a 'two and four' game," or words to that effect?
>
> A. Words to that effect; yes. (R. 50) . . .

Walter O. Smith's testimony includes these statements:

> Q. Well, then you say you were getting up to leave, and what happened then?

A. Mr. Short made the remark, he said, "Don't run off. I would like to talk to you," or, "I want to talk to you for a minute," so I sat back down, and he said, "I understand that the town is going to open up," and he said, "I would like to open up a 'two and four' game in the back."

Q. What did you say?

A. And so I told him that might be possible, and he made the remark, "I had heard the town was going to be opened up," and he wanted to know what it would cost . . . (R. 71, 72) . . .

Q. So, when you went back to the bar with this note, tell us what happened then?

A. I went back and, as I say, I explained to Mr. Short the conversation that I had had with the Chief, and he said, "Well, I want to talk it over with my partner a minute," so he went out the front of the bar and he was gone approximately four or five minutes and he came back and he said, "It is O.K. with my partner" (R. 73) . . .

A. . . . when I was in the washroom Mr. Short came in and he handed *we* five twenty dollar bills, and he said this one hundred dollars was to apply on the first week after District Court closes. (R. 74) . . .

Furthermore, the instruction was entirely favorable to the appellant, and it is unreasonable to presume that the jury would interpret it in such a manner as to prejudice him.

Concerning Instruction No. 17, relating to the evaluation of a defendant's testimony, it is sufficient to cite this court's recent decision in *Stapleton v.*

United States (9 Cir. 1958) 260 F2d 415, wherein a similar instruction was approved.

CONCLUSION.

Appellant has had a trial free from error, the court's rulings below were sound, and the jury which found the appellant guilty was correctly instructed on the applicable law. It is respectfully submitted that the judgment and sentence below should be affirmed by this court.

Dated, Juneau, Alaska,
April 24, 1959.

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